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IN THE
COURT OF APPEALS OF INDIANA

MARK T. JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0606-CR-272
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D01-9811-CF-541

October 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Mark T. Jones appeals his sentence for burglary as a class B felony.[1] Jones raises two issues, which we revise and restate as:

I. Whether Jones's sentence violated his Sixth Amendment rights as discussed in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g denied;

II. Whether the trial court abused its discretion in sentencing Jones; and

III. Whether Jones's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On October 27, 1998, Jones entered a residence without the homeowner's permission with the intent to take property from inside the residence. Jones was aware that the homeowner, Michael Lee, was dead because Jones was present when Lawrence Terry shot and killed him.

On November 20, 1998, the State charged Jones with burglary as a class B felony. Jones pleaded guilty to burglary as a class B felony. As part of the plea agreement, the State agreed to recommend a "non-binding sentence not greater than the average sentence for this offense," and Jones agreed to testify truthfully against Terry. Appellant's Appendix at 8. At sentencing, the trial court found the following aggravating factors: (1) Jones's criminal history; and (2) the fact that "this burglary occurred because [Jones] knew that the victim of the burglary certainly was not going to be able to do anything about it because he was dead." Sentencing Transcript at 25. The trial court found the

[1] Ind. Code § 35-43-2-1 (1998) (subsequently amended by Pub. L. No. 88-1999, § 2 (eff. July 1, 1999)).

following mitigating factors: (1) Jones was willing to accept his responsibility and testify truthfully; and (2) Jones's expression of remorse. The trial court then sentenced Jones to twenty years in the Indiana Department of Correction with five years suspended to be served consecutive to an unrelated sentence that Jones was already serving.

On March 28, 2005, Jones filed a petition to appoint counsel to pursue proceedings under Ind. Post-Conviction Rule 2 and a petition for leave to file a belated notice of appeal. The trial court denied Jones's motion for appointment of counsel until Jones filed a motion specifying his grounds for appeal. Jones then filed a case summary detailing his grounds for appeal, and the trial court issued an order appointing counsel to consult with Jones. Jones then filed his notice of appeal, but we dismissed Jones's appeal because the trial court had never granted Jones permission to file a belated appeal. Jones v. State, No. 71A03-0510-CR-508 (Ind. Ct. App. Feb. 28, 2006). Jones filed another petition for permission to file a belated appeal, which the trial court granted.

I.

The first issue is whether Jones's sentence violated his Sixth Amendment rights as discussed in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g denied. Jones argues that one of the trial court's aggravators was improper under Blakely. The State argues that we should not review Jones's claim because he was sentenced long before Blakely was decided and Blakely should not apply retroactively to Jones's sentence. We note that there are conflicting decisions from this court on this issue. Compare Robbins v. State, 839 N.E.2d 1196 (Ind. Ct. App. 2005) (holding that Blakely

would not apply retroactively to the defendant's belated appeal), and Hull v. State, 839 N.E.2d 1250 (Ind. Ct. App. 2005) (holding that Blakely would not apply retroactively to the defendant's belated appeal), with Perry v. State, 845 N.E.2d 1093 (Ind. Ct. App. 2006) (applying Blakely retroactively to the defendant's belated appeal), trans. denied. The Indiana Supreme Court has granted transfer and scheduled oral argument on this issue. See Gutermuth v. State, 848 N.E.2d 716 (Ind. Ct. App. 2006) (holding that Blakely would apply retroactively to the defendant's belated appeal), trans. granted and opinion vacated. However, we need not address the State's argument because, even if Blakely applied retroactively to Jones's belated appeal, Jones's sentence would not be affected.

On June 24, 2004, the United States Supreme Court decided Blakely, which held that facts supporting an enhanced sentence must be admitted by the defendant or found by a jury. Blakely, 542 U.S. at 303-304, 124 S. Ct. at 2537; Cotto v. State, 829 N.E.2d 520, 527 n.2 (Ind. 2005). In Smylie v. State, the Indiana Supreme Court held that Blakely was applicable to Indiana's sentencing scheme and required that "the sort of facts envisioned by Blakely as necessitating a jury finding must be found by a jury under Indiana's existing sentencing laws." Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005). The Indiana Supreme Court has noted that "Blakely and the later case United States v. Booker[, 543 U.S. 220, 125 S. Ct. 738, 756 (2005),] indicate that there are at least four ways that meet the procedural requirements of the

Sixth Amendment in which such facts can be found and used by a court in enhancing a sentence." Mask v. State, 829 N.E.2d 932, 936 (Ind. 2005).

> [A]n aggravating circumstance is proper for Blakely purposes when it is: 1) a fact of prior conviction; 2) found by a jury beyond a reasonable doubt; 3) admitted to by a defendant; or 4) stipulated to by the defendant, or found by a judge after the defendant consents to judicial fact-finding, during the course of a guilty plea in which the defendant has waived his Apprendi rights.

Id. at 936-937 (citing Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005)).

The trial court here found two aggravating factors, the nature and circumstances of the crime and Jones's criminal history. Specifically, the trial court stated:

> I do think it is an appropriate aggravator to consider that this burglary occurred because the defendant knew that the victim of the burglary certainly was not going to be able to do anything about it because he was dead. . . . But that's not what I'm focusing on at this point here. What I have is a 24 year old man who has three other felonies, one of which was a crime of violence. It seems to me that indeed makes the aggravation outweigh the mitigation.

Sentencing Transcript at 25-26.

Jones argues that "[n]one of the facts pertaining to the circumstances of the offense were admitted by the defendant or found by a jury" and that "[t]he homeowner's name and the fact that he had been killed prior to the burglary were not included in the factual basis admitted by the defendant . . . ." Appellant's Brief at 18. During the sentencing hearing, Jones's counsel stated that Jones was with Terry when Terry killed Lee and that Jones went with Terry to burglarize Lee's residence. Sentencing Transcript at 7-8. This statement was sufficient to constitute an admission by Jones that he knew the homeowner was dead at the time that he burglarized the residence. See, e.g., Trusley,

829 N.E.2d at 925-926 (holding that a statement by counsel was sufficient to constitute an admission by Trusley that the victim was under twelve at the time of his death); Kincaid v. State, 839 N.E.2d 1201, 1205 (Ind. Ct. App. 2005) ("Kincaid's counsel's statement was sufficient to constitute an admission that Alex's injuries were extensive and permanent."). Moreover, the trial court properly used Jones's criminal history as an aggravating factor because "[a] sentence may be enhanced on the basis of prior convictions, consistent with the Sixth Amendment." Williams v. State, 838 N.E.2d 1019, 1020 (Ind. 2005). Consequently, both of the aggravators used by the trial court were proper under Blakely.

II.

The next issue is whether the trial court abused its discretion in sentencing Jones. Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). In order for a trial court to impose an enhanced sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found to those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003).

Jones first argues that the trial court abused its discretion by failing to consider his age as a mitigating factor and failing to give more weight to his guilty plea. "The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." Ellis v. State, 736 N.E.2d 731, 736 (Ind. 2000). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001). However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

As for the trial court's failure to find Jones's age as a mitigating factor, we note that Jones did not advance this argument during sentencing. "If the defendant does not advance a factor to be mitigating at sentencing, this Court will presume that the factor is not significant and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal." Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000), reh'g denied. Waiver notwithstanding, we cannot say that the trial court abused

its discretion by failing to consider Jones's age as a mitigating factor. Jones was twenty-two years old at the time of the offense and was well past the age where the law requires special treatment. See, e.g., Corcoran v. State, 774 N.E.2d 495, 500 (Ind. 2002) (holding that the defendant's age of twenty-two was not a mitigating circumstance after "considering both the seriousness of this crime and the fact that [the defendant was] well past the age of sixteen where the law requires special treatment"), reh'g denied.

Jones also argues that the trial court did not give enough weight to his guilty plea as a mitigating factor. The trial court found the fact that Jones was "willing to accept his responsibility and testify truthfully" to be a "significant factor." Sentencing Transcript at 26. However, the trial court specifically stated that the aggravating factors outweighed this mitigator. Although the trial court did not give the mitigator the weight that Jones desires, the trial court was not required to do so. See, e.g., Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002) (holding that the trial court did not abuse its discretion where it considered a mitigating circumstance but did not give it weight).

Lastly, Jones argues that the trial court should not have required his sentence to be served consecutive to his sentence from an unrelated conviction. The trial court had discretionary statutory authority to order consecutive sentences pursuant to Ind. Code § 35-50-1-2(c), which provides: "The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time." In order to impose consecutive sentences, a trial court must find at least one aggravating circumstance. Ortiz v. State, 766 N.E.2d 370, 377 (Ind. 2002). If a trial court uses

aggravating or mitigating circumstances to impose consecutive sentences, it must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances. Crawford v. State, 770 N.E.2d 775, 782 (Ind. 2002). The trial court here imposed consecutive sentences because the Elkhart County case was a separate, unrelated crime and there "should be a separate punishment." Sentencing Transcript at 26. "It is a well established principle that the fact of multiple crimes or victims constitutes a valid aggravating circumstance that a trial court may consider in imposing consecutive or enhanced sentences." O'Connell v. State, 742 N.E.2d 943, 952 (Ind. 2001). Consequently, we conclude that the trial court did not abuse its discretion by imposing consecutive sentences. See, e.g., Berry v. State, 689 N.E.2d 444, 446 (Ind. 1997) (holding that the trial court properly imposed consecutive sentences even though the two sentences were not contemporaneously imposed).

III.

The final issue is whether Jones's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Our review of the nature of the offense reveals that Jones was with Terry when Terry shot and killed Lee. Jones and Terry then burglarized Lee's residence. Our review of the character of the offender reveals that at the time of the offense twenty-two-year-old Jones had accumulated a significant criminal history. As an adult, Jones was convicted of failure to stop at an accident, auto theft as a class D felony, receiving stolen property as a class D felony, driving while suspended, robbery as a class B felony, and aggravated battery as a class B felony. While Jones did plead guilty, cooperate with the police, and agree to testify against Terry, after due consideration of the trial court's decision, we cannot say that Jones's sentence is inappropriate.

For the foregoing reasons, we affirm Jones's sentence for burglary as a class B felony.

Affirmed.

KIRSCH, C. J. and MATHIAS, J. concur